**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED OCTOBER 8, 2002**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1036

CECG, INC., a corporation of the State of New Jersey,

Appellant

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.

On Appeal from the United States District Court for the
District of New Jersey
(Civil Action No. 00-cv-02262) District Judge:
Judge Harold A. Ackerman

Submitted Under Third Circuit LAR 34.1(a)
September 27, 2002

Before: BARRY, AMBRO and GARTH, Circuit Judges
(Opinion Filed: October 8, 2002)

OPINION

*Appendix A*

GARTH, Circuit Judge:

In this contractual dispute, Plaintiff-Appellant CECG, Inc., appeals the district court's grant of summary judgment to Defendant-Appellees Magic Software Enterprises, Inc. and Magic Software Enterprises, Ltd.

We will affirm the district court's judgment.

I.

Because we write solely for the benefit of the parties, we recount the facts and the procedural history of the case only as they are relevant to the following discussion.

This case involves a contractual dispute over the sale and licensing of Magic, a computer software program that can be used to develop other software. Appellees Magic Software Enterprises, Ltd. and Magic Software Enterprises, Inc. (hereinafter referred to collectively as "MSE") are, respectively, an Israel-based software company and its California subsidiary, which sells Magic software in the United States.

The parties have had a prior round of litigation. In 1988, CECG made its first purchase of Magic software. Magic software has two components: (1) a development "engine" that allows computer programmers to develop software; and (2) a "runtime module" that allows users of software developed through Magic's engine to operate that software. CECG claimed that when it purchased its first Magic development engine and purchased an accompanying single-

user runtime module, the MSE software salesperson made an oral promise to provide a free runtime module upgrade every time that CECG purchased an upgrade of the development engine. Later, when MSE stopped offering unlimited runtime modules in the United States, CECG sued MSE in federal court to enforce its claim that MSE was obligated to continue to provide CECG with free unlimited runtime module upgrades. The district court entered summary judgment for MSE on the basis that the Statute of Frauds required such a promise to be in writing to be enforceable. *CECG, Inc. v. Magic Software Enterprises*, No. 95-800 (JCL) (D. N.J. Sept. 13, 1996), at 10-11.

In September 1999, CECG asked MSE to upgrade its development engine to the most recent version of Magic software. CECG's president, Mitch Geier, requested a copy of the license agreement as well as a demonstration or evaluation copy of the software.

The Magic software license agreement sent to Geier along with the demonstration copy contained limitations on use, allowing the purchaser to

> [u]se the Product as licensed with respect to number of users. The Product is packaged in a manner to provide a specific number of users per package. If several persons use this Product at the same time or if one person uses it on more than one computer, you must pay one license fee for each copy being used. This includes use on a computer network. You must pay a license fee for the number of users specified in the Product

> package. You may not use the Product for more than the specified number of users. In case you have any questions regarding the number of users permitted you should immediately contact MSE.

Magic License Agreement, Def.-Appellee's App. 11. There was no mention of an unlimited runtime license in the license agreement. The agreement also provided that "MSE may from time to time revise or update its Products. Such updates and revisions will be supplied only to registered users and according to MSE's then prevailing update and support policies. MSE is not obligated to make any Product revisions or to supply them." *Id.* at 12.

The Magic license agreement contained a forum selection clause as well.[1] Additionally, the agreement contained a complete merger clause. *Id.* The license agreement provided for its own acceptance if the software package is opened: "OPENING THIS PACKAGE CONSTITUTES YOUR ACCEPTANCE OF THE LICENSE AGREEMENT SET FORTH BELOW." *Id.* at 11.

After receiving the evaluation software and license, Geier said that he did not accept the terms of the license agreement. After the evaluation period ended, Geier decided he wished to purchase the new version of the development engine. Geier recalls speaking with MSE and telling the salesperson that

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1. The license agreement provides: "You acknowledge that any action or suit brought to enforce any right or remedy of this Agreement shall be subject to the exclusive jurisdiction and venue of the California State or Federal Courts sitting in Orange County, California." Magic License Agreement, Def.-Appellee's App. 12.

there had been prior litigation between CECG and MSE; and that though he wanted to purchase the software, he would not do so on the terms of MSE's license agreement. He told the salesperson that he would not provide a credit card, but instead would send in a purchase order with modified terms and conditions. *See* Appellant's Br. at 10; Appellee's Br. at 15.[2]

Geier then sent a purchase order to MSE along with a check. On its face, the purchase order listed a "Development Universal Client Server" ($3600) and "Technical support contract including updates as well as contract pricing for upgrades" at a price of $880 for one year. CECG Purchase Order, Def.-Appellee's App. 22. At the bottom of the front side of the purchase order, the order stated: "P.O. Number Must Be Referenced On Each Package, Packing Slip, Invoice, And/Or Any Correspondence. Please Enter Our Order for the Goods Described Herein, Subject to the Terms and Provisions Set Forth on the Face and Reverse Side of this Purchase Order." *Id.* The reverse side of the order contained several terms. The key provision at issue, relating to the unlimited runtime license, is contained within a paragraph with the caption "Intellectual Property Rights":

> This order shall also reinstate the buyer[']s understanding of the unlimited run time license. The seller shall update and upgrade the unlimited

2. The salesperson does not recall any discussion with Geier relating to prior litigation or the unlimited runtime license. See Appellee's Br. at 13 n. 3. She does apparently recall asking for a credit card number. See Appellant's Br. at 10 (citing Urschel Dep. Tr. at 25, 3 Pl.-Appellant's App. 372).

> runtime license currently called deployment without charge to the buyer whenever the buyer upgrades or updates the development tools or program generator to any version or renamed product so that the licensed versions and names shall match. . . . This reinstatement is irrevocable.

CECG Purchase Order T 4, Def.-Appellee's App. 23. The purchase order contained its own forum-selection clause.[3] The purchase order provided for its own acceptance and provided that it was the exclusive agreement between the parties.[4]

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3. The forum-selection clause in the purchase order states: "This Purchase Order and the acceptance of it shall, as provided herein, constitute a contract made in, and to be governed in all respects by the laws of the state of New Jersey. Venue shall be in Middlesex County, NJ." CECG Purchase Order ¶ 8, Def.-Appellee's App. 23.

4. The purchase order provided:

> Commencement of performance pursuant to this Purchase Order constitutes acceptance hereof by Seller. If specified delivery dates cannot be met, Seller shall notify Buyer promptly of Seller's best alternative. The terms of this Purchase Order may not be modified, superseded or amended except in a writing signed by an authorized representative of Buyer. Each shipment received by Buyer shall only be upon the terms of this Purchase Order, notwithstanding any terms contained in any quotation, acknowledgment, license agreement, invoice or other form of Seller, or Buyer's acceptance of, or payment for, any shipment or any other act. *Id* ¶ 1.

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MSE received the purchase order and deposited CECG's check. MSE then shipped a CD-ROM containing the program, along with another copy of the license agreement. CECG communicated with MSE to explain that it only required the "Product Authorization Key" (the codes) necessary to unlock the evaluation software for use. MSE faxed a Product Authorization Key to CECG, which stated that

> The PAK is an integral part of licensed software product identified on the front of this document . . . and is provided subject to the licence [sic] terms applicable to the software. Licensee shall maintain the PAK as confidential, and not transfer, disclose, or otherwise make it available to any third party. Any copies of the PAK must be limited to internal use by licensee only.

Def.-Appellee's App. 29. After CECG found that its old runtime module was incompatible with the new version of Magic's development engine, Geier again communicated with MSE in an attempt to obtain an unlimited runtime license in the belief that the contract obligated MSE to provide such a license.

According to Geier's notes, Russell Taitz, the vice president of operations for MSE, told Geier that MSE would not honor the purchase order, but would be willing to refund CECG the purchase price. Def-Appellee's App. 31.

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CECG filed a complaint in the Superior Court of New Jersey, Middlesex County, on April 7, 2000, alleging breach of contract and seeking damages and specific performance. MSE removed the case to federal district court for the District of New Jersey on the basis of diversity jurisdiction. CECG filed a motion for remand to state court. The district court denied the motion, holding that there was diversity jurisdiction because the parties were diverse and the amount-in-controversy requirement was met; and that the venue provisions contained in CECG's Purchase Order and the Magic License Agreement negated one another pursuant to § 2-207 of the Uniform Commercial Code, as adopted by New Jersey. *CECG, Inc. v. Magic Software Enterprises*, No. 00-2262 (HAA) (D. N.J. Feb. 26, 2001), at 5-7, 8-11.

Following discovery, MSE filed a motion for summary judgment, and CECG filed a cross-motion for summary judgment and a motion for reconsideration of the district court's denial of remand to state court.

The district court denied CECG's motions and granted MSE's motion for summary judgment. The district court granted summary judgment for MSE on the contract claims, finding that the terms of MSE's license agreement and CECG's subsequent purchase order conflicted with one another with respect to whether MSE was obligated to provide CECG with an unlimited runtime license, and that, because the purchase order's term concerning the unlimited runtime license was "a material alteration of the contract," accordingly, under UCC § 2-207, "the contradictory term falls out of the parties' agreement." *CECG, Inc. v. Magic Software*

*Enterprises*, No. 00-CV-2262 (HAA) (D. N.J. Dec. 11, 2001), at 18 (citing N.J. Stat. Ann. § 12A:2-207).[5]

This timely appeal followed.

II.

We have jurisdiction to hear this appeal of the district court's final judgment in this diversity action pursuant to 28 U.S.C. § 1291. We have plenary review of a district court's order granting summary judgment. *See, e.g., Carter v. McGrady*, 292 F.3d 152, 157 (3d Cir. 2002). Accordingly, we apply those standards that the district court should have applied below. *Chisolm v. McManimon*, 275 F.3d 315, 321 (3d Cir. 2001). Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Our function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

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5. The district court also granted summary judgment to MSE on CECG's claim under the New Jersey consumer fraud statute, N.J. Stat. Ann. § 56:8-2, concluding that "CECG provides no evidence of deception" that would suffice to "establish that MSE engaged in any acts of fraud, unconscionable commercial practice, deception or false promises." *Id.* at 20. In addition, the district court denied CECG's motion for reconsideration of its earlier denial of CECG's motion for remand.

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The parties do not dispute the contents of the writings that the parties have exchanged; rather, they disagree on the documents' legal effect. There are therefore no genuine issues of material fact; the only question before us is which party is entitled to judgment as a matter of law.

Section 2-207 of the Uniform Commercial Code governs the transaction between CECG and MSE.[6] In *Step-Saver Data*,

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6. UCC § 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract

(Cont'd)

*Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991), a case which both parties cite as controlling, we analyzed the effect of contradictory documents relating to the sale of software: the buyer's telephone order (followed by a purchase order) and the seller's software box-top license. *See id.* at 9596. We held that UCC § 2-207 governed the transaction, stating that "[i]n the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed," with any gaps to be filled by the UCC's provisions. *Id.* at 99 (footnote omitted).

Similarly, in the dispute between CECG and MSE, the initial license agreement sent by MSE along with the evaluation copy of the software became effective when CECG obtained and installed the software. When CECG submitted its purchase order and check to buy Magic software, CECG had objectively manifested its acceptance of the terms of the license agreement. To the extent that the reverse side of the purchase order contained additional or different terms, such terms, if they constituted material alterations of the contract, would drop out of the contract formed, unless CECG's

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(Cont'd)

> for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

N.J. Stat. Ann. § 12A: 2-207.

purchase order indicated that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1). The purchase order did not so indicate.[7] The provision on the reverse side of CECG's purchase order that allowed for CECG to receive a unlimited runtime license at no additional cost for each purchase of a new version of Magic's development engine constituted a material alteration of the contract and therefore did not become part of the contract.

Accordingly, we will affirm the district court's grant of summary judgment to MSE on CECG's contract claims. We also will affirm the district court's grant of summary judgment to MSE on the consumer fraud claim, as CECG has not made any argument of substance on appeal that the district court erred.[8]

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7. Even if acceptance were expressly conditional on assent to these terms, and thus there were no written contract, the conduct of the parties established a contractual relationship. UCC § 2-207(3) provides that the conduct of both parties can establish a contract, and that, to the extent that there is no agreement, the UCC fills any gaps in the contract. Both parties clearly conducted themselves in a manner that reflected that there was a contractual relationship; the disagreement is as to what the terms of the contract are. The writings of the parties, however, do not agree on whether MSE is obligated to provide CECG with an unlimited runtime license, and there is no provision of the UCC that would allow for CECG to receive an unlimited runtime license.

8. CECG makes only the conclusory statement that "[t]he sale of the merchandise by defendant and its subsequent conduct entitles the plaintiff to its day in court on the issue of Consumer Fraud." (Cont'd)

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III

Plaintiff also appears to appeal the district court's denial of remand.[9] We have plenary review over a district court's denial of remand. See *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 665 (3d Cir. 2002).

CECG argues that the district court erroneously deleted the conflicting terms as it viewed the forum-selection provisions in CECG's purchase order and in MSE's license agreement as conflicting terms under UCC § 2-207. *See* Appellant's Br. at 16-17.

Forum selection clauses are material terms to a contract. *See, e.g., Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 621 n. 13 (11th Cir. 2001) ("arbitration clauses, like other kinds of forum selection clauses, are generally considered material terms under state law variants of the Uniform Commercial Code."). Based on our analysis of the conflicting writings, then, UCC § 2-207 requires that the conflicting term in CECG's purchase order either must give

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(Cont'd)

Appellant's Br. at 34. Without anything more, we will not upset the determination of the District Court.

9. The district court denied plaintiff's motion for remand. Plaintiff moved for reconsideration, which was denied. CECG requests remand as a possible form of relief. *See* Appellant's Br. at 38-39. It is not clear, however, whether plaintiff appeals the denial of its motion for reconsideration or the denial of its motion for remand. We will assume the latter.

way to MSE's forum-selection clause, or must drop out because of the conflict between MSE and CECG's writings. *See* UCC 2-207(3).

Accordingly, there is no basis for remanding the case to New Jersey state court. We will affirm the district court's denial of CECG's motion for remand.

IV.

For the foregoing reasons, the judgment of the district court will be AFFIRMED.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Leonard I. Garth

Circuit Judge

**APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 12, 2001**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

00-CV-2262 (HAA)

CECG, Inc., a corporation of the State of New Jersey,

Plaintiff,

v.

MAGIC SOFTWARE ENTERPRISES INC., and MAGIC SOFTWARE ENTERPRISES LTD.,

Defendants.

FILED
DEC 12, 2001
ENTERED ON THE DOCKET
DEC 12, 2001

OPINION & ORDER

ACKERMAN, District Judge:

This matter comes before the Court on several pre-trial motions brought by both parties. Defendants Magic Software Enterprises, Inc., ("MSE") and Magic Software Enterprises Ltd. ("Magic Ltd.") have moved for summary judgment,

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Plaintiff CECG, Inc. ("CECG") has cross moved for summary judgment and submitted a motion for reconsideration. For the following reasons, Defendants' motion for summary judgment is GRANTED and CECG's motions for summary judgment and reconsideration are DENIED.

I. Background

This case arises from a contractual dispute over the sale of Magic, a computer program that facilitates the development of other computer software. Magic is produced by Magic Ltd., an Israeli software corporation and distributed in the United States by Magic Ltd.'s subsidiary, MSE, a Californian corporation. CECG, the Plaintiff in this action, is a New Jersey Corporation that uses Magic to create customized software for its clients. This case arises from a disagreement between CECG on the one hand and MSE and Magic Ltd. on the other, over the distribution of the latest version of the Magic software, version 8.x. The central issue for this Court to determine is on what terms MSE agreed to sell Magic 8.x to CECG.

Magic is distributed in two components: (i) the development engine; and (ii) the runtime module. The development engine enables programmers to create new software for their clients. As part of its marketing strategy, MSE allows programmers to use the development engine on a trial basis for free to encourage them to use its software. Over time, Magic Ltd. has offered newer versions of this component as it has developed improvements to the software. In order to distribute software created by the development engine, however, programmers must purchase the second component

of Magic called the runtime module. The runtime module essentially allows clients, or "end users" to operate software that has been created using Magic. Magic Ltd. offers several types of runtime modules. These range from those that permit a single user to run software from a desktop computer to more sophisticated modules that allow a large number of Lasers to use the new software over the Internet.

When CECG began using Magic Ltd.'s products to design software in 1988, the initial price for the development engine was $199 and two versions of the run time module were available: a single user license for $59 or an "unlimited" license for $699. CECG initially purchased development engine version 2.5 and a compatible single user runtime module. CECG claimed that when it purchased the development engine the salesperson made an oral promise to provide a free runtime module upgrade every time CECG purchased another version of the development engine. CECG received a free upgrade of a single user runtime module in 1989 and then acquired an unlimited runtime module in 1990. CECG believed that the original promise of a free runtime upgrade entitled it to free unlimited runtime module upgrades into perpetuity. In June 1993, however, MSE ceased offering unlimited runtime modules in the United States.

Subsequently, CECG initiated litigation in the District of New Jersey to enforce MSE's oral promise of a free unlimited runtime license and alleging commercial fraud. CECG argued that it was entitled to a free upgrade of its unlimited runtime license with every purchase of an updated version of the development engine and that in the event that it was not entitled to such an upgrade, it was induced to buy

the development engine through commercial fraud. District Judge Lifland dismissed CECG's suit on summary judgment as the alleged promise violated the statute of frauds and there was no evidence of commercial fraud. See *CECG, Inc. v. Magic Software Enterprises*, No. 95-800, slip. op. (D.N.J. Sept. 13, 1996).

Toward the end of 1999, CECG was still using MSE's software and sought to upgrade its development engine to Magic 8.x. CECG's president, Mr. Geier, contacted MSE regarding the potential purchase of an upgrade. MSE then faxed him a price list, a description of MSE's products and MSE's standard software license agreement (the "License Agreement"). The price list did not include any mention of an unlimited runtime license. The License Agreement instructed the purchaser that he or she could

> Use the Product as licensed with respect to the number of users. The Product is packaged in a manner to provide a specific number of users per package. If several persons use this Product at the same time or if one person uses it on more than one computer, you must pay one license fee for each copy being used. This includes use on a computer network. You must pay a license fee for the number of users specified on the Product package. You may not use the Product for more than the specified number of users. In case you have any questions regarding the numbers of users permitted you should immediately contact MSE.

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Deposition of Urshel, Ex. 1, Magic License Agreement for North America Only, General Copying Restrictions, at 1. The License Agreement also advised purchasers to

> Carefully read all the terms and conditions of this Product License Agreement prior to opening this package, If you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded. No refunds will be given for Products with an opened disk package or missing component(s). Only if you accept each of the terms below should you open this package and use the enclosed Product.

*Id.*, at 1. The License Agreement contained a forum provision, which recited that "any action or suit brought to enforce any right or remedy of this Agreement shall be subject to the exclusive jurisdiction and venue of the California State or Federal Courts sitting on Orange County, California." *Id.*, Governing Law and Forum Selection, at 2. The License Agreement also contained language regarding its duration, stating that

> [t]he License is valid until terminated. Licensee may terminate it by destroying the programs and documentation and all copies thereof. If any of the terms and conditions of the Agreement are violated by the Licensee, in addition to all other legal rights and remedies, MSE may terminate this license. Upon termination, Licensee shall destroy the Product.

*Id.*, at 2, Terms of the License. After CECG reviewed these documents, it requested the use of a demonstration copy of the new development engine. MSE then sent to CECG a copy of the demonstration software and codes that enabled CECG to use the software on a trial basis until January 2000.

In January 2000, CECG contacted MSE and requested another price list. After receiving the second price list, CECG contacted MSE to place an order. When the operator requested payment, CECG informed her that it would not pay by credit card, but instead would forward a copy of its own purchase order with its own terms and conditions. CECG then drafted its own purchase order (the "Purchase Order"), dated January 10, 2000, and forwarded it to MSE.

The Purchase Order's front page indicated that the price for the development engine was $3,600 and one year of technical support was $880. CECG enclosed a check for the combined amount of $4,480. In addition to specifying the product, quantity, and price that CECG wanted, the Purchase Order contained a number of supplementary terms and conditions. The reverse side of the Purchase Order contained language that allegedly obliged MSE to provide, without charge, an unlimited runtime module for use with version 8.x and all subsequent versions of the development engine. The Purchase Order required MSE to make CECG's old runtime module compatible with version 8.x and later versions of the development engine. It specifically stated:

> This order shall reinstate the buyers [sic] understanding of the unlimited run time [sic] license. The seller shall update and upgrade the unlimited

> runtime license currently called deployment [sic] without charge to the buyer whenever the buyer upgrades or updates the development tools or program generator to any version or renamed product so that the licensed versions and names shall match shall march [sic]. This reinstatement is irrevocable.

Purchase Order, ¶ 4. A separate paragraph also selected Middlesex County, New Jersey, as the venue for resolving prospective contractual disputes.

MSE received the Purchase Order, retained CECG's payment, and shipped the discs needed to install Magic version 8.x. Included with the discs, MSE forwarded another copy of its standard "shrink wrap" license agreement (the "License Agreement"). Before it received this package however, CECG contacted MSE to explain that it was already running an older version of the development engine and therefore it did not need to install entirely new software. Instead. CECG merely needed a set of codes, called the Product Authorization Key, or PAK, to convert its development engine to version 8.x. After this conversation, MSE provided the required codes by fax and CECG was able to make the conversion. The fax MSE sent with the relevant codes contained the following language: "The PAK is an integral part of the licensed software product identified on the front of this document ("The Software") and is provided subject to the license terms applicable to the software." Deposition of Urshel, Exs. 6, 7.

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Shortly after it completed the conversion to Magic 8.x, CECG learned that its old runtime module was not compatible with its new development engine. Compl., ¶¶ 12-13. Although CECG could create new software using version 8.x, its clients could not operate those programs. *Id.*, ¶ 22. According to CECG, its Purchase Order obligated MSE to remedy this compatibility problem without charge. When MSE refused, CECG brought this suit.

*II. Procedural History*

CECG commenced this action on April 17, 2000 in the New Jersey Superior Court, Middlesex County, Chancery Division. The Complaint set forth causes of action for breach of contract and consumer fraud and sought equitable relief as well as damages.

Defendants removed the action to this Court on May 10, 2000 on the basis of diversity between the parties. CECG moved for remand claiming the amount in issue was below the threshold for diversity actions and that its contract provided for exclusive jurisdiction in Middlesex County. On February 16, 2001 this Court issued an opinion denying CECG's motion for remand finding that the amount in issue exceeded that required for diversity jurisdiction and that the contract's forum clause was not binding on the defendants.

There are three-motions currently pending before this court: (1) CECG moves for reconsideration of the Court's Order denying its motion to remand; (ii) Defendants have moved for summary judgment on all claims; and (iii) CECG has cross moved for summary judgment on the issues of

liability and damages. The Court will begin by addressing the motion for reconsideration before turning to the motions for summary judgment.

*III. Motion for Reconsideration*

CECG brings its Motion for Reconsideration — styled "Motion for Consideration" — based on its argument that the Court erroneously assumed that the Plaintiff accepted MSE's license Agreement enclosed in the second shipment of discs. CECG argues that "during discovery, it was established without contradiction that nothing of the kind occurred." CECG's Motion for consideration, ¶ 3. CECG goes on to argue that while it did receive a license with the second shipment of discs after Magic received the CECG Purchase Order, this license was sent in error and the discs were never opened. As a result, CECG argues that the only document that controls the relationship between the parties is its Purchase Order.

In opposition to CECG's motion for reconsideration, Defendants make several arguments. As a preliminary matter, they point out that a motion for reconsideration must be based on material that the court overlooked at the time it made its decision and that the arguments forwarded by the Plaintiff rely on material from depositions that were conducted *after* the Court's Order. Defendants argue that the form of CECG's motion fails to adhere to Local Rules 7.1 (g) and 7.2(a) and in any event the original decision of the court was correct as it comported with the Uniform Commercial Code. Paraphrasing their original arguments regarding the motion to remand, Defendants point out that there is a dispute between

two contracts in this case and that UCC § 2-207 provides that where there is no one document that governs the relationship between the parties and two contractual provisions conflict, the terms cancel each other out and the parties' conduct is governed by the UCC. In this case, Defendants argue that the impact of this law is that CECG's forum selection clause is voided and the Court, therefore, has jurisdiction.

It is well-established that a motion for reconsideration under Rule 7.1 (g) is an extremely limited procedural vehicle. *See Resorts International, Inc. v. Greate Bay Hotel and Casino, Inc.*, 830 F. Supp. 826, 831 (D.N.J. 1992). Rule 7.1(g) provides that:

> A motion for reargument shall be served and filed within 10 days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believes the Judge or Magistrate Judge has overlooked.

Local Civil Rule 7.1(g). As the language of the rule indicates, an applicant for a motion for reconsideration must set forth "the matters or controlling decisions" which the litigant believes the court has overlooked. See Rule 7.1(g). Thus, a motion for reconsideration will be successful only where dispositive factual matters or controlling questions of law were presented to the court but not considered. *See Pelham v. United States*, 661 F. Supp. 1063, 1065 (D.N.J. 1987).

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The only proper ground for granting a motion for reconsideration under Rule 7.1 (g) is that matters or decisions overlooked by the court might reasonably have altered the result. *See G-69 Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990). Where the motion merely raises a party's disagreement with the court's initial decision, that "should be dealt with in the normal appellate process, not on a motion for reargument under Local Rule 12(I) [now renumbered as Rule 7.1 (g)]." *Florham Park Chevron, Inc., v. Chevron U.S.A. Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1988).

In this case, CECG does not allege that the Court overlooked any controlling decisions in its original decision. Instead, CECG argues that the Court mistakenly assumed facts that were subsequently contradicted in depositions. As an initial matter, subsequent factual revelations cannot ground a motion for reconsideration. As argued by the Defendants, the Court could not "overlook" matters that had yet to be proven. Regardless of the fact that CECG points to subsequent evidence from depositions, however, this Court specifically addressed the issue in question in its original decision. CECG argues that the Court erroneously assumed that the controlling contract was that sent by mistake by MSE in response to CECG's Purchase Order. However, in its Opinion, the Court recognized that

> CECG attempted to avoid the impact of the unopened License Agreement by arguing that it neither read not assented to the License Agreements terms. (Greier Cert. at ¶¶ 10-15.) In CECG's view, the Purchase Order was the last writing and, as a result, constituted the final expression of the

> parties' agreement. This reasoning is flawed. The U.C.C. rejects the "last shot rule." As a result, a party cannot unilaterally dictate the terms of a contract simply be sending the last written form. *See Step-Saver*, 939 F.2d at 99. Thus, the Purchase Order is not binding merely because it was final.

Opinion and Order, at 11 n.11. Given that the Plaintiffs motion is predicated on evidence that was discovered *after* the Court's decision through depositions, and explicitly addressed as a hypothetical in its original Order, Plaintiffs motion for reconsideration is denied.

*IV. Summary Judgment Motions*

Defendants Magic Ltd. and MSE have brought a motion for summary judgment on both the contract and the consumer fraud claims asserted by CECG. Defendants argue that CECG's claims for breach of contract are barred by the Statute of Frauds, contradicted by Section 2-207 of the Uniform Commercial Code ("UCC"), and that the contract is unenforceable and illegal because it contravenes the Robinson-Patman Act, 15 U.S.C. § 13. Defendants further argue that since they honored their contractual obligations they cannot be accused of violating the Consumer Fraud Act. In addition to its responses to the Defendants' arguments on summary judgment, CECG has also submitted its own motion for summary judgment requesting "partial summary judgment on liability and immediate specific performance." Plaintiff's Brief in Support of Plaintiff's Motion for Summary Judgment ("Pl. Br."), at 15. The Court will consider these motions together.

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*V. Standard of Review*

Pursuant to Rule 56(c), a District Court is directed to grant a motion for summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). *See also Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987). In other words, "[s]ummary judgment may be granted only if there exists no genuine issue of material fact that would permit a reasonable jury to find for the nonmoving party." *Miller v. Indiana Hosp.*, 843 F.2d 139, 143 (3d Cir. 1988). All facts and inferences are construed in the light most favorable to the non-moving party. *See Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1349 (3d Cir. 1994).

The substantive law will identify which facts are "material." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *Id.*

The party seeking summary judgment always bears the initial burden of production, i.e., of making a prima facie

showing that it is entitled to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This may be done either by demonstrating there is no genuine issue of fact and that the moving party must prevail as a matter of law, or by demonstrating that the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. *Id.* at 322-23. Once either showing is made, the burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden as well as establish the existence of genuine issues of material fact. *Id.* at 324.

However, at the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact-finder. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993). Therefore, to raise a genuine issue of material fact, the summary judgment opponent "'need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." *Id.*; *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant].").

It is clear, however, that if a moving party satisfies its initial burden of establishing a *prima facie* case for summary judgment, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, "[t]here must . . .

be sufficient evidence for a jury to return a verdict in favor of the nonmoving party; if the evidence is merely colorable or not significantly probative, summary judgment should be granted." *Armbruster v. Unisys Coop.*, 32 F.3d 768, 777 (3d Cir. 1994).

*VI. Discussion*

The Defendants seek summary judgment on both the Plaintiff's contract claims and its claim of consumer fraud. The Court will consider each in turn.

*The Contract Claims*

In the present case, Defendants assert that summary judgment should be entered against CECG because UCC § 2-207, prevents enforcement of CECG's Purchase Order's terms that are inconsistent with MSE's License Agreement. Defendants suggest that in cases where there is a conflict between material terms of two form agreements, the conflicting terms are canceled out and the contract between the parties is enforceable only as to the terms upon which the parties agree. Here Defendants argue that the disagreement over the scope of the runtime license amounts to a disagreement over the quantity of goods at issue. Defendants argue that the Purchase Order is a "material alteration of the prior oral communications of the parties, as well as to the terms on the face of the purchase order itself, to the price list which MSE has previously sent to CECG, and to the MSE documentation which accompanied the software which was sent to CECG." Brief in Support of Defendants' Motion for

Summary Judgment, at 14. Defendants conclude that, in light of the conflict over a material term, the UCC operates to exclude that term from the agreement.

Plaintiffs argue in response that the License agreement expired on December 31, 1999 when the codes for the trial software ceased to function. As a result, Plaintiff suggests that there is only one document that controls the conduct between the parties: the CECG Purchase Order CECG then suggests that any difference of opinion regarding the force of the Purchase Order was a unilateral mistake on the part of MSE. The Plaintiff has also submitted a cross-motion for summary judgment requesting "partial summary judgment on liability and immediate specific performance." Plaintiffs Brief in Support of Plaintiff's Motion for Summary Judgment, at 15. In its motion, CECG provides lean support for essentially four separate theories that entitle it to specific performance: (i) unilateral mistake; (ii) the conduct of the parties; (iii) the balance of equities; and (iv) estoppel.

CECG begins by characterizing MSE's acceptance of its Purchase Order and subsequent repudiation of its terms as a unilateral mistake. Based on the same facts, CECG argues that it has relied on the terms of its Purchase Order to its detriment and thus the contract should be enforced. CECG then states the maxim that "Equity Regards as Done That Which Ought to be Done," and asserts that while MSE's previous promise was oral, "[i]t may have taken TEN years, but Defendant's agreement is now in writing and enforceable." Plaintiffs Brief In Support of Plaintiff's Motion For Summary Judgment, at 13. CECG also appeals to the maxim "Where a Loss Must Be Borne By One of Two

Innocent Persons Equity Will Impose the Loss on That Party Whose Act First Could Have Prevented the Loss," and argues that the Defendants should bare the loss in this case as the root of the conflict lies in the Defendant's unilateral mistake. *Id.* at 15. CECG goes on to note that in the past, MSE has prevailed in other contractual disputes by arguing in favor of its shrink wrap licenses. Finally, CECG argues that because MSE has argued in previous litigation that its contract controlled because it was the last writing between the parties, MSE should be estopped from arguing that the last writing does not control in this case.

In response, MSE faults CECG for failing to address the impact of the U.C.C. on the parties' contract dispute. MSE argues that the doctrine of unilateral mistake has no application to the facts of this case. Defendants frame their response to CECG's conduct of the parties arguments in terms of the formation of contract. As an initial matter, Defendants argue that this analysis should be governed by the U.C.C. However, they go on to state that even if the Court were to look for the formation of a contract by operation of the conduct of the parties, that MSE never accepted an offer to purchase an unlimited runtime license as claimed by the Plaintiff. Defendants argue that "[e]ven if MSE's performance by sending the Product Authorization Key is deemed to be the acceptance, that performance did not include the free perpetual unlimited runtime upgrade." Brief In Opposition to Plaintiff's Cross-Motion for Summary Judgment, at 6. In opposition to CECG's equitable arguments, Defendants submit that the Court's contract analysis should govern the relationship and that the statute of frauds prevents enforcement of an oral promise that has already been litigated

by the Plaintiffs. Defendants suggest that CECG's arguments with respect to estoppel are founded on an erroneous apprehension of the facts, and a distortion of its legal position. Specifically, Defendants argue that CECG's Purchase Order is not the last writing between the parties. Contrary to Plaintiff's assertion that the initial License Agreement expired with the trial period for the development engine, Defendants argue that a fair reading of the License Agreement reveals that it "applied to whatever software CECG might purchase, not that its terms expired at the end of the demonstration period." *Id.* at 9. Finally, Defendants argue that specific performance of the contested contract term is not available as the term is not part of the parties agreement.

The question of whether this contested term is part of the parties' agreement is the cornerstone of this case. Given their extensive commercial conduct, the Court has little difficulty finding that a contract exists between these parties. The question that remains, however, is what the terms of that contract are.

To resolve this question, the Court must examine three documents: the License Agreement, the Purchase Order and MSE's fax containing the PAK. While there is some dispute over the interpretation of its duration, both parties agree that CECG received a license agreement from MSE when it requested the trial use of MSE's development engine in September of 1999. Both parties also agree that MSE received CECG's Purchase Order in January of 2000. MSE has explicitly conceded for the purposes of this motion that the Purchase Order had two sides, both of which were received by MSE. Reply Brief in Support of Defendants' Motion of

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Summary Judgment, at 4. CECG also admits that after it sent MSE payment and its purchase order, that CECG received a fax containing the PAK that included the codes for the continued use of the development engine. The parties do not dispute the contents of these various communications nor do they dispute the facts surrounding their exchange. Their current argument centers around the legal force of these documents. As a result, for the purposes of this Court's consideration of their respective summary judgment motions, there are no genuine issues as to any material facts with regard to the content of the parties' contract and all that remains is for the Court to determine which party is entitled to judgment as a matter of law.

In this case, the parties have not reduced their agreement to one signed document. Instead, there is a series of correspondence that begins with the MSE's License Agreement that accompanied the trial version of its development engine that was sent to the Plaintiff in September of 1999. This document is a classic "shrink wrap" license. Neither party suggests that the License Agreement did not govern the use of the development engine during CECG's trial period. While Plaintiff argues that this contract expired on December 31, 1999 when its trial period ended. Defendants argue that it continued to govern the use of its software once the Plaintiff resumed use of the product. We agree.

MSE's License Agreement states that it is "valid until terminated [and that the] Licensee may terminate it by destroying the programs and documentation and all copies thereof." There is no evidence that CECG terminated the License agreement by destroying the development module.

Quite the contrary, CECG paid $4,480 for the codes to continue to use the development engine. As the Defendants argue in their brief in opposition to Plaintiff's cross-motion for summary judgment, the License did not terminate with the end of the trial period, rather it "applied to whatever software CECG might purchase." Brief In Opposition to Plaintiff's Cross-Motion for Summary Judgment, at 9. The conclusion that the License Agreement survived the end of the trial period for the development engine is further fortified by the fax sent to CECG by MSE that contained the codes CECG required to continue using MSE's software. That fax stated on its face that it provided the codes "subject to the license terms applicable to the software." As a result, the subsequent transmission of the codes that allowed CECG to resume use of the development engine were provided subject to the terms of the original License Agreement.

In addition to their argument that the License Agreement had expired, Plaintiff also argues that its Purchase Order should control as it is the last writing between the parties. However, as the Third Circuit has explained, the U.C.C. has rejected the so called "last shot" rule and rendered the chronology of exchanged forms between merchants irrelevant because "it would be unfair to bind the buyer of goods to the standard terms of the seller, when neither party cared sufficiently to establish expressly the terms of their agreement, simply because the seller sent the last form." *Step-Saver Data Systems, Inc. v. WYSE Technology*, 939 F.2d 91, 99 (1991). In light of this reasoning, this Court need not determine which of the License Agreement, or the Purchase Order was technically the last document to be exchanged. Instead, once we have determined that the License Agreement

remains in effect, we must establish what other documents may also control the relationship between the parties and whether those documents conflict with the License Agreement.

For the purposes of this motion, neither party disputes that CECG submitted a Purchase Order that contained terms and conditions regarding the use of its runtime module. The Purchase Order's provision that purports to grant CECG the right to free upgrades of its unlimited runtime license is plainly at odds with the express language of the License Agreement that restricts the use of the product. The Third Circuit has stated that in circumstances like these, where the parties' "conduct establishes a contract, but the parties have failed to adopt expressly a particular writing as the terms of their agreement, and the writings exchanged by the parties do not agree, UCC § 2-207 determines the terms of the contract." *Step-Saver Data Systems, Inc., v. Wyse Technology*, 939 F.2d 91, 98 (3d Cir. 1991). In circumstances where a merchant accepts a contract with a writing that states additional terms, UCC § 2-207 provides that those terms become part of the contract except where: "(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received." N.J.S.A. 12A: 2-207. As the terms of the Purchase Order introduce an obligation to provide a product to the Plaintiffs that Defendants no longer provide to anyone, the term is clearly a material alteration of the contract.

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As this court noted in its decision on CECG's motion to remand issued on February 16, 2001,

> Under the U.C.C., conflicting terms cancel each other out. See N.J.S.A. 12A:2207, cmt. 6 (construing a different term in an acceptance as an objection to the corresponding term in the offer and stating that "the conflicting terms do not become part of the contract"); see *[Northrop Corp. v. Litronic Industr.*, 29 F.3d 1173, 1178 (7th Cir. 1994)] (noting that "the majority view is that the discrepant terms fall out and are replaced by suitable UCC gab-filler"); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579-80 (10th Cir. 1984) (distinguishing between additional terms, which may become part of the contract, and different terms, which knock each other out). Here, the License Agreement and the Purchase Order contain different . . . terms. Those terms nullify each other.

Just as this Court found in the earlier motion, here terms of the License Agreement and that of the Purchase Order directly contradict each other with respect to the question of whether MSE is obligated to provide an unlimited runtime license. As a result, the contradictory term falls out of the parties' agreement.

As the Third Circuit has recognized, it is not the role of the courts to create different or a better contracts than the parties themselves have entered into. *Con Air. Corp. v. Old Dominion Freight Line, Inc.*, 22 F.3d 529, 534 (3d Cir. 1994).

In this case, the parties have exchanged a series of correspondence that relate to the distribution of software created using the Magic development engine, but none of these writings evidence a meeting of the minds with respect to the essential term at issue in this case: the existence of an unlimited runtime license. Absent such an indication, it is not up to this court to insert into the contract what the parties themselves have failed to agree upon.

Given the court's determination that the contract does not contain a provision entitling CECG to an unlimited runtime license, no reasonable jury could find in favor of CECG on its claim for specific performance of the contested contract provision. Therefore, CECG's cross-motion for entry of summary judgment on its contract claim and immediate specific performance is denied. Conversely, Defendant's motion for entry of summary judgment dismissing CECG's contract claim is granted. In light of the Court's determination regarding the effect of UCC § 2-207, there is no need to address Defendant's claims regarding the effect of the Statute of Frauds or the applicability of the Robinson-Patman Act.

*The Commercial Fraud Claim*

Defendants also seek summary judgment with respect to CECG's consumer fraud claim. CECG alleges that MSE committed commercial fraud under N.J.S.A. § 56:8-2 and New Jersey common law. Defendants argue that the court should enter summary judgment because MSE has fulfilled its contractual obligations to CECG. The consumer fraud statute provides:

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> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

N.J.S.A. § 56:8-2. Even accepting all of CECG's evidence as true, and viewing it in the light most favorable to it, CECG cannot establish that MSE engaged in any acts of fraud, unconscionable commercial practice, deception or false promises.

In its reply to the Defendants' motion, CECG argues that consumer fraud "is the very marketing tactic that has allowed Defendant Magic to prosper. In order to open the US market to this foreign software, and thereby create a user base in the United States, Magic sold its early version with oral promises, that it knew could not be enforced by the buyers." Pl. Br. at 18. The accusation that MSE perpetrated commercial fraud through inducing contracts through unenforceable promises was the subject of prior litigation between these parties. *See CECG, Inc. v. Magic Software Enterprises*, No. 95-800, slip. op. (D.N.J. Sept. 13, 1996). These allegations, however, are not the focus of the current litigation as CECG goes on to plainly assert that its Current claims are limited to the "new contract between the parties," Pl. Br. at 19.

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Despite an array of allegations, CECG provides no evidence of deception that relate to the facts before this court. CECG's central complaint is that it has been unable to enforce the terms of its own Purchase Agreement that require MSE to provide an unlimited runtime license. There is no evidence that MSE offered to provide an unlimited runtime license before CECG introduced that obligation as a term of its Purchase Order. While MSE honors previously existing unlimited runtime licenses, it is clear that the company no longer provides this kind of license for new development engines in the United States. CECG seeks a product that MSE does not sell. This falls far short of the requisite deception required to make out a claim of consumer fraud.

In this case, no reasonable jury could find in favor of CECG on its consumer fraud claim. There is simply no evidence before the court that supports CECG's accusations of deception with regard to this contract. Therefore, the Defendants' motion for entry of summary judgment on the consumer fraud claim is granted. Accordingly,

IT IS on this 11th day of December 2001:

ORDERED that Defendants' motion for summary judgment is GRANTED;

ORDERED that Plaintiff's motion for reconsideration is DENIED; and

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ORDERED that Plaintiffs motion for summary judgment is DENIED.

s/ Harold A. Ackerman
Harold A. Ackerman, U.S.D.J.

## APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED FEBRUARY 16, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Harold A. Ackerman, U.S.D.J.
Civ. A. No. 00-2262 (HAA)

CECG, INC., a corporation of the State of New Jersey,

Plaintiff,

v.

MAGIC SOFTWARE ENTERPRISES, INC. and MAGIC SOFTWARE ENTERPRISES, LTD.,

Defendants.

ORIGINAL FILED
FEB 16, 2001

OPINION & ORDER

Harold A. Ackerman, U.S.D.J.

Plaintiff, CECG, Inc., moves to remand this case to the New Jersey Superior Court, Middlesex County, Chancery Division. For the following reasons, plaintiff's motion is denied.[1]

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1. The Court did not hear argument, rather, it opted to adjudicate plaintiffs motion on the papers. See Fed. R. Civ. P. 78.

## *Appendix C*

### *I. BACKGROUND*

This is a dispute between software companies. Defendant, Magic Software Enterprises, Ltd. ("Magic Ltd."), is an Israeli corporation that produces a product known as Magic Software. (Cert. of Russell Taitz at ¶2.)[2]

Succinctly stated, Magic Software is a tool for writing other software. It consists of two components. The first is a "development engine" that enables programmers to create new software for their clients. Magic Ltd. has improved its development engine over time. Newer versions apparently offer features that earlier versions lack. The second component is a "runtime module," which allows the client — or "end user" — to operate the newly created software. (*Id.* at ¶¶ 3-7.) Magic Ltd. offers several types of runtime modules: at the low end, it sells modules that permit a single end user to run the new software from the desktop of a computer, while, at the high end, it offers modules that allow a large number of end users to operate the new software over the internet. (*Id.*) Magic Ltd. distributes Magic Software in the United States through its subsidiary, Magic Software Enterprises, Inc. ("Magic Inc."), a California corporation. (*Id.* at ¶ 2.)

CECG, a New Jersey corporation, is a computer programming firm. (Compl. at ¶1.) It uses Magic Software to create customized software for its clients. CECG began using Magic Ltd.'s products in 1988. At some point it purchased development engine 5.02C along with a compatible "unlimited" runtime

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2. Taitz serves as the Vice President of Operations for Magic Software Enterprises, Inc. (Taitz Cert. at T 1.)

module. (Cent. of Mitch Geier at ¶¶ 2-6.)[3] That module enabled an unlimited number of end users to run the software that CECG created using version 5.02C.[4]

Toward the end of 1999 CECG decided to improve its infrastructure by upgrading its development engine. Although version 5.02C was not yet obsolete, CECG desired to convert to version 8.x to take advantage of that program's new features and capabilities. (*Id.* at 3-4.) Rather than order the program by phone, CECG drafted its own purchase order ("the Purchase Order") and forwarded it to Magic Inc. (Id. 7.) In addition to specifying the product, quantity, and price that CECG wanted, the Purchase Order contained a number of supplementary terms and conditions. Paragraph 4 allegedly obligated Magic Inc. to provide, without charge, an unlimited runtime module for use with version 8.x and all subsequent versions of the development engine.[5] In addition, paragraph 8

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3. Geier is CECG's President. (Geier Cert. at ¶ 1.)

4. Magic Ltd. ceased offering unlimited runtime modules in the United States in 1992. (Taitz Cert. ¶ 8.)

5. The Purchase Order actually required Magic Inc. to make CECG's old runtime module compatible with version 8.x and later versions of the development engine. It specifically stated:

> This order shall reinstate the buyers [sic] understanding of the unlimited run time [sic] license. The seller shall update and upgrade the unlimited runtime license currently called deployment [sic] without charge to the buyer whenever the buyer upgrades or updates the development tools or program generator to any version

(Cont'd)

selected Middlesex County, New Jersey as the venue for resolving prospective contractual disputes.

Magic Inc. received the Purchase Order, retained CECG's payment, and shipped the disks needed to install version 8.x. Along with the disks, Magic Inc. forwarded a copy of its standard license agreement ("the License Agreement"), which advised purchasers to:

> Carefully read all the terms and conditions of this Product License Agreement prior to opening this package. If you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded. No refunds will be given for Products with an opened disk package or missing component(s). Only if you accept each of the terms below should you open this package and use the enclosed Product.

(Taitz Cert. at Ex. B, "MAGIC LICENSE AGREEMENT FOR NORTH AMERICA ONLY.") The License Agreement also contained a forum provision, which recited that "any action or suit brought to enforce any right or remedy of this Agreement shall be subject to the exclusive jurisdiction and

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(Cont'd)

> or renamed product so that the licensed versions and names shall match shall match [sic]. This reinstatement is irrevocable.

(Purchase Order at ¶ 4.)

venue of the California State or Federal Courts sitting in Orange County, California." (*Id.* at Ex. B, "GOVERNING LAW AND FORUM SELECTION.") Magic Inc. shipped the disks and License Agreement in a single package.

Before it received this package, CECG contacted Magic Inc. CECG explained that it was already running an older version of the development engine and, thus, that it did not need to install entirely new software. Rather, CECG merely needed a set of codes to convert version 5.02C to version 8.x. Magic Inc. provided the codes by fax, enabling CECG to make the conversion. (Geier Cert. at ¶¶ 11-13.)

Shortly after it completed this conversion, CECG learned that its old runtime module was not compatible with its new development engine. (Compl. at ¶¶ 12-13.) Although CECG could create new software using version 8.x, its clients could not operate those programs. (*Id.* at 22.) According to CECG, paragraph 4 of the Purchase Order obligated Magic Inc. to remedy this compatibility problem without charge. When Magic Inc. refused, CECG brought suit.

## *II. PROCEDURAL HISTORY*

CECG commenced this action on April 17, 2000 in the New Jersey Superior Court, Middlesex County, Chancery Division. The Complaint set forth causes of action for breach of contract and consumer fraud and sought equitable relief as well as damages.

Defendants removed the action to this Court on May 10, 2000 on the basis of diversity between the parties. CECG

moved for remand. In CECG's view, remand is appropriate for two reasons. The first is statutory. CECG claims that its damages fall below the threshold for diversity actions and, hence, that this Court lacks jurisdiction over this dispute.

CECG also advances a contractual argument. It reasons that, even if this Court possesses jurisdiction, the Purchase Order provides for exclusive venue in Middlesex County. Neither argument is persuasive.

## *III. DISCUSSION*

### A. CECG's Statutory Argument

Actions that are within the federal courts' original jurisdiction are generally removable from state court. *See* 28 U.S.C. § 1441. The removing party shoulders the burden or demonstrating that removal is proper. *State of New Jersey v. City of Wildwood*, 22 F.Supp.2d 395, 400 (D.N.J. 1998). Defendants posit that removal is warranted because this case is within the federal courts' diversity jurisdiction. Therefore, to resist CECG's remand motion, defendants must show that this case satisfies the dictates of 28 U.S.C. § 1332.

There is no dispute that complete diversity exists here. Nor could there be. CECG is a New Jersey corporation. Magic Ltd. is an Israeli entity; its principal place of business is located in Or Yehuda, Israel. (Taitz Cert. at ¶ 2; Ex. B.) Its distributor, Magic Inc., is a California corporation headquartered in Irvine, California. (Notice of Removal at ¶ 2.) Therefore, the requisite diversity exists between the parties. *See* 28 U.S.C. § 1332.

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The real issue is whether this case meets the $75,000.00 amount-in-controversy requirement for diversity actions. *Id.* CECG maintains that it does not. In fact, CECG suggests that its damages are less than $50,000.00. It offers to cap its recovery at that amount if this case is remanded to state court. (Pl.'s Br. in Supp. of Motion to Remand at p. 2.) CECG's arguments are unconvincing.

To discern the amount in controversy, the Court must conduct an independent appraisal of CECG's claims. *See Penn v. Wal-Mart Stores, Inc.*, 116 F.Supp.2d 557, 561 (D.N.J. 2000). That appraisal begins with an analysis of the complaint, but may encompass additional evidence if necessary. *Id.* at 562. The goal is, ultimately, to arrive at a "reasonable reading of the value of the rights being litigated." *Angus v. Shiley*, 989 F.2d 142, 146 (3d Cir. 1993); *see also In re Corestates Trust Fee Litia.*, 39 F.3d 61, 65 (3d Cir. 1994) (opining that "in injunctive actions, it is settled that the amount in controversy is measured by the value of the right sought to be protected by the equitable relief").

The Complaint's first count, which accuses defendants of breach of contract, requests an equitable remedy: specific performance of the terms of the Purchase Order. Paragraph 4 of the Purchase Order allegedly requires defendants to provide an unlimited runtime module for use with version 8.x and all subsequent versions of the development engine. (Purchase Order at ¶ 4.) The Complaint seeks to compel defendants to supply these modules so that CECG can distribute its software over the internet to an unlimited client pool. (Compl. at ¶ 7.)

Defendants submit persuasive — and uncontradicted — evidence that this equitable relief is worth much more than $75,000.00. See *Becker v. Sherwin Williams*, 717 F.Supp. 288,295 (D.N.J. 1989) (noting that courts must value the equitable relief sought to determine whether the amount-in controversy requirement has been met). Magic Ltd. markets a number of runtime modules that allow end users to operate software from the internet. The most basic costs $1,400.00 per user; the most intricate, $70,000.00 per user. (Taitz. Cert. at ¶ 7.) Based on these figures, a runtime module that would enable an unlimited number of end users to run software from the internet could reasonably cost more than $75,000.00. *See Angus*, 989 F.2d at 146 (noting that "the amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated").[6] The right to receive unlimited runtime modules in perpetuity – for use with each successive version of Magic Ltd.'s development engine — could easily be worth well over $1 million. Therefore, this Court finds that CECG's equitable claims, standing alone, exceed the jurisdictional amount for diversity actions. See 28 U.S.C. § 1332.[7]

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6. For example, a basic module that would allow 100 end users to operate software over the internet would cost $140,000.00. (Taitz Cert. at ¶ 6.) To accommodate the same number of end users, a more complex module might run as much as $7,000,000.00. (Id. at ¶ 7.)

7. CECG also seeks compensatory contract damages as well as punitive and treble damages for defendants' allegedly fraudulent conduct. These damages, coupled with the value of the equitable relief sought, easily satisfy the amount in controversy requirement. *See Angus*, 989 F.2d at 146.

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In an effort to thwart diversity, CECG offers to cap its damages at $50,000.00. That offer is misguided. CECG cannot avoid diversity jurisdiction by stipulating that its damages are less than $75,000.00. *See Angus*, 989 F.2d at 145. Moreover, even if CECG's offer did have legal significance, diversity jurisdiction would still exist in this case. The Complaint seeks equitable relief in addition to damages. As noted, that reasonable value of that equitable relief far exceeds $75,000.00. Accordingly, this Court finds that diversity jurisdiction exists in this case despite CECG's offer to limit its recovery.

B. *CECG's Contractual Argument*

CECG also argues that remand is appropriate even if diversity jurisdiction exists. The Purchase Order contains a venue clause, which designates Middlesex County, New Jersey as the site for litigation. (Purchase Order at ¶ 8.) That provision allegedly binds the parties and necessitates remand to state court. CECG's argument presupposes that the Purchase Order's venue clause is a component of the parties' agreement. For the following reasons, it is not.

The parties agree that New Jersey's Uniform Commercial Code governs their dealings.[8] The U.C.C. rejects the "mirror

8. The U.C.C. applies to transactions in goods. N.J.S.A. 12A: 2-102. The sale at issue involves software — which CECG purchased to modify and resell — and qualifies as a transaction in goods. *See Conopco, Inc. v. McCreadie*, 826 F.Supp. 855, 869 (D.N.J. 1993), *aff'd*, 40 F.3d 1239 (3d Cir. 1994) (acknowledging that software may be considered a good within the meaning of the U.C.C.); *Triple Point*

(Cont'd)

image rule," which means that a contract may be formed even if the acceptance does not precisely match the offer. See N.J.S.A. 12A:2-207; *see also Northrop Corp. v. Litronic Industr.*, 29 F.3d 1173, 1174 (7th Cir. 1994). Under the U.C.C., "a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, **unless acceptance is expressly made conditional on assent to the additional or different terms.**" N.J.S.A. 12A:2-207(1) (emphasis supplied). The highlighted language of limitation allows the offeree to prevent contract formation by conditionally accepting the offer. A conditional accep-tance, which expressly requires the offeror to assent to the additional or different terms, is construed as a counteroffer. *See Reaction Moldings Technologies, Inc. v. General Electric Co.*, 588 F.Supp. 1280, 1288 (E.D. Pa. 1984).

Due to the policies underlying the U.C.C., courts are hesitant to find that a counteroffer has been made rather than an acceptance with proposed terms. *See id.* A counteroffer will be found "only where the offeree clearly reveals its unwillingness to proceed with the transaction unless it is assured of the offeror's assent to the different or additional

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*Technology, Inc. v. D.N.L. Risk Mgmt., Inc.*, No. CIV. A. 99-4888 (WHW), 2000 WL 1236227, at *6-7 (D.N.J. April 11, 2000) (distinguishing between transactions involving software, which are governed by the U.C.C., and those involving intellectual property, which are not); see also *CECG, Inc. v. Magic Software Enterprises, Inc.*, Civ. A. No. 95-800 (JCL) (D.N.J. filed Sept. 13, 1996) (applying the U.C.C. in a prior contractual dispute between CECG and defendants).

terms." *Id.*; *see also Air Master Sales Co. v. Northbridge Park Co-Op Inc.*, 748 F.Supp. 1110, 1116 (D.N.J. 1990) (finding that the offeree's response was a counteroffer and not an acceptance). In other words, the offeree must manifest an intent to forgo the transaction if the offeror does not agree to the additional or different terms. *See Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 102 (3d Cir. 1991).

In this case, the Purchase Order constituted an offer to buy defendants' product on very specific terms. In response, Magic Inc. shipped the product along with the License Agreement. CECG contends that, merely by sending the product and retaining payment, Magic Inc. accepted the Purchase Order's terms. That argument is untenable. Magic Inc. expressly conditioned the transaction on CECG's assent to the License Agreement's terms, which diverged markedly from the Purchase Order's terms.[9]

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9. The following differences are illustrative: (1) the Purchase Order demanded an unlimited runtime module for use with version 8.x and all later versions of that program, (Purchase Order at ¶ 4), while the License Agreement offered a per-user runtime module for version 8.x only, (Taitz Cert. at Ex. B, "GENERAL COPYING RESTRICTIONS," ¶ a); (2) the Purchase Order contained a broad remedies clause, (Purchase Order at ¶ 7), whereas the License Agreement included a limited warranty that constrained the buyer's remedies, (Taitz Cert. at Ex. B, "LIMITED WARRANTY," ¶¶ c-e); (3) the Purchase Order required defendants to pay CECG's attorneys' fees and costs in the event of litigation, (Purchase Order at ¶ 10), while the License Agreement disclaimed such a provision, (Taitz Cert. at Ex. B, "ACKNOWLEDGMENT"); and (4) the Purchase Order chose New Jersey law and selected a New Jersey venue, (Purchase Order at ¶ 8), whereas the License Agreement opted for California

(Cont'd)

*Appendix C*

The License Agreement's language is unmistakable. It directed CECG to "carefully read all the terms and conditions of this Product License Agreement," and announced that "if you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded." (Taitz Cert. at Ex. B, "MAGIC LICENSE AGREEMENT FOR NORTH AMERICA ONLY.") By promising a refund, the License Agreement conveyed defendants' willingness to forgo the sale if CECG did not agree to the License Agreement's terms. *See Step-Saver*, 939 F.2d at 102 (intimating that a refund offer could amount to a conditional acceptance/counteroffer but finding that the facts of the case did not warrant that conclusion).

In addition to offering a refund, the License Agreement warned CECG not to open the package or use the enclosed software unless it accepted the License Agreement's terms. (Taitz Cert. at Ex. B., "MAGIC LICENSE AGREEMENT FOR NORTH AMERICA ONLY" (cautioning that "only if you accept each of the terms below should you open this package and use the enclosed Product").) By employing conditional language, the License Agreement communicated that defendants would not proceed with the transaction, nor recognize CECG's right to use the product, until CECG agreed to the License Agreement's terms. *See Air Master*, 748 F.Supp. at 1116-17.

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(Cont'd)
law and a California venue, (Taitz Cert. at Ex. B, "GOVERNING LAW AND FORUM SELECTION"). Standing alone, these dramatic discrepancies create significant doubt that the License Agreement was meant as an acceptance of the Purchase Order.

These provisions make plain that the License Agreement offered defendants' product on a take-it-or-leave-it basis and expressly indicated that a contract would not arise unless CECG assented to the License Agreement's specific terms. *See* N.J.S.A. 12A:2-207(1); *Reaction Molding*, 588 F.Supp. at 1288. As such, the License Agreement was a counter-offer — not an acceptance with proposed terms — and did not transform the Purchase Order into a binding contract. *See Air Master*, 748 F.Supp. 1116-17; *see also Step-Saver*, 939 F.2d at 99 n. 19 (finding that courts must often resolve questions of contract formation under the U.C.C. as a matter of law). Therefore, the Purchase Order's venue clause provides no basis for remand.[10]

If a contract arose at all in this case, then it came about as a result of the parties' behavior rather than their writings. *See* N.J.S.A. 12A:2-207(3). Assuming that the parties' conduct did, in fact, give rise to a contract, the terms of that

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10. Even if the License Agreement did constitute an acceptance, remand would still be unwarranted. Under the U.C.C., conflicting terms cancel each other out. See N.J.S.A. 12A:2-207, cmt. 6 (construing a different term in an acceptance as an objection to the corresponding term in the offer and stating that "the conflicting terms do not become part of the contract"); *see Northrop*, 29 F.3d 1178 (noting that "the majority view is that the discrepant terms fall out and are replaced by a suitable UCC gap-filler"); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579-80 (10th Cir. 1984) (distinguishing between additional terms, which may become part of the contract, and different terms, which knock each other out). Here, The License Agreement and the Purchase Order contain different venue terms. Those terms nullify each other. Thus, assuming that the License Agreement did accept the Purchase Order, the resultant contract would not have a venue clause.

agreement "consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act." *Id.* As noted, the License Agreement and Purchase Order contain conflicting venue terms. Those provisions cancel out and would not become part of any contract arising under § 2207(3).[11]

## IV. CONCLUSION & ORDER

For all of the foregoing reasons, the Court finds (1) that this case satisfies the requirement for diversity jurisdiction, and (2) that the Purchase Order's venue clause provides no basis for remand to state court. Therefore:

It is on this, 16th day of February 2001:

ORDERED that CECG's motion to remand to the Superior Court, Middlesex County, Chancery Division is DENIED.

s/ Harold A. Ackerman
Harold A. Ackerman, U.S.D.J.

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11. CECG attempts to avoid this conclusion by arguing that it neither read nor assented to the License Agreement's terms. (Geier Cert. at ¶¶ 10-15.) In CECG's view, the Purchase Order was the last writing and, as a result, constituted the final expression of the parties' agreement. This reasoning is flawed. The U.C.C. rejects the "last shot rule." As a result, a party cannot unilaterally dictate the terms of a contract simply by sending the last written form. See *StepSaver*, 939 F.2d at 99. Thus, the Purchase Order is not binding merely because it was final.

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED NOVEMBER 19, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1036

CECG, INC.,

Appellant

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.

On Appeal from the United States District Court
for the District of New Jersey
(Civil Action No. 00-CV-2262)
Before: BARRY, AMBRO, and GARTH, Circuit Judges

ORDER

The Petition for Panel Rehearing filed by Appellant, CECG, Inc., a corporation of the State of New Jersey, in the above-entitled matter, having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for panel rehearing, the Petition for Panel Rehearing is hereby DENIED.

*Appendix D*

BY THE COURT,

s/ [illegible]
United States Circuit Judge

DATED: 19 NOV 2002

## APPENDIX E — RELEVANT PROVISIONS INVOLVED

RELEVANT PROVISIONS INVOLVED

7TH AMENDMENT TO US CONSTITUTION

AMENDMENT [VII]
Civil trials

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*Appendix E*

N.J.S.A. 12A:2-201

NEW JERSEY STATUTES ANNOTATED
TITLE 12A. COMMERCIAL TRANSACTIONS
SUBTITLE 1. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
SUBCHAPTER 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

12A:2-201. Formal requirements; statute of frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable.

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (12A:2-606).

*Appendix E*

N.J.S.A. 12A:2-202

NEW JERSEY STATUTES ANNOTATED
TITLE 12A. COMMERCIAL TRANSACTIONS
SUBTITLE 1. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
SUBCHAPTER 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

12A:2-202. Final written expression: parol or extrinsic evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (12A:1-205) or by course of performance (12A:2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

*Appendix E*

N.J.S.A. 12A:2-207

NEW JERSEY STATUTES ANNOTATED
TITLE 12A. COMMERCIAL TRANSACTIONS
SUBTITLE 1. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
SUBCHAPTER 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

12A:2-207. Additional terms in acceptance or confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a

reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.